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Report of the Ad Hoc Committee for the Negotiation of a Convention against Corruption on the work of its first to seventh sessions

Addendum

Interpretative notes for the official records (travaux préparatoires) of the negotiation of the United Nations Convention against Corruption

I. Introduction

1. The present document contains interpretative notes that were discussed by the Ad Hoc Committee for the Negotiation of a Convention against Corruption throughout the process of negotiation of the draft convention. These notes will be included in the official records of the negotiation process, which the Secretariat will prepare in accordance with standard practice. The present document is submitted to the General Assembly for information purposes only; the Ad Hoc Committee took no formal action on these notes and none is expected of the Assembly at its fifty-eighth session.

II. Interpretive notes

Chapter I

Article 2

Subparagraph (a)

2. The *travaux préparatoires* will indicate that the word "executive" is understood to encompass the military branch, where appropriate.

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3. The *travaux préparatoires* will indicate that the term "office" is understood to encompass offices at all levels and subdivisions of government from national to local. In States where subnational governmental units (for example, provincial, municipal and local) of a self-governing nature exist, including States where such bodies are not deemed to form a part of the State, "office" may be understood by the States concerned to encompass those levels also.

4. The *travaux préparatoires* will indicate that, for the purpose of defining "public official", each State Party shall determine who is a member of the categories mentioned in subparagraph (a) (i) of article 2 and how each of those categories is applied.

Subparagraph (b)

5. The *travaux préparatoires* will indicate that the term "foreign country" includes all levels and subdivisions of government, from national to local.

Subparagraph (d)

6. The *travaux préparatoires* will indicate that the phrase "assets of every kind" is understood to include funds and legal rights to assets.

Subparagraph (f)

7. The *travaux préparatoires* will indicate that the word "temporarily" is understood to encompass the concept of renewability.

Article 3

Paragraph 1

8. The *travaux préparatoires* will indicate that the phrase "in accordance with its terms" is not intended to limit the application of mutual legal assistance.

9. The *travaux préparatoires* will indicate that offences established in accordance with the Convention should not be understood to require the adoption of new domestic legislation for the inclusion of an offence under domestic law where a corresponding offence already exists under such law.

Article 4

Paragraph 1

10. The *travaux préparatoires* will indicate that the principle of non-intervention is to be understood in the light of Article 2 of the Charter of the United Nations.

Chapter II

Article 6

11. The *travaux préparatoires* will indicate that the body or bodies referred to in this article may be the same as those referred to in article 36.

Article 7

Paragraph 1

12. The *travaux préparatoires* will indicate that the existence of the systems referred to in paragraph 1 of article 7 shall not prevent States Parties from maintaining or adopting specific measures for disadvantaged groups.

Article 9

Paragraph 1

13. The *travaux préparatoires* will indicate that nothing in paragraph 1 shall be construed as preventing any State Party from taking any action or not disclosing any information that it considers necessary for the protection of its essential interests related to national security.

Article 10

Subparagraph (a)

14. The *travaux préparatoires* will indicate that, regarding the protection of personal information, the use of which is addressed in the Convention, States Parties may be inspired by principles laid down in the guidelines for the regulation of computerized personal data files adopted by the General Assembly in its resolution 45/95 of 14 December 1990.

Article 11

Paragraph 2

15. The *travaux préparatoires* will indicate that reference to similar independence should be understood to include cases where such independence is identical.

Article 13

Paragraph 1

16. The *travaux préparatoires* will indicate that reference to non-governmental organizations and community-based organizations relates to such organizations established or located in the country. This note is intended as an explanation and not as an amendment to paragraph 1.

Subparagraph (d)

17. The *travaux préparatoires* will indicate that the intention behind paragraph 1 (d) is to stress those obligations which States Parties have already undertaken in various international instruments concerning human rights to which they are parties and should not in any way be taken as modifying their obligations.

Article 14

Paragraph 1

Subparagraph (a)

18. The *travaux préparatoires* will indicate that the words "other bodies" may be understood to include intermediaries, which in some jurisdictions may include stockbroking firms, other securities dealers, currency exchange bureaux or currency brokers.

19. The *travaux préparatoires* will indicate that the words "suspicious transactions" may be understood to include unusual transactions that, by reason of their amount, characteristics and frequency, are inconsistent with the customer's business activity, exceed the normally accepted parameters of the market or have no clear legal basis and could constitute or be connected with unlawful activities in general.

Subparagraph (b)

20. The *travaux préparatoires* will indicate that the establishment of a financial intelligence unit called for by this subparagraph is intended for cases where such a mechanism does not yet exist.

Paragraph 4

21. The *travaux préparatoires* will indicate that, during the negotiations, the words "relevant initiatives of regional, interregional and multilateral organizations" were understood to refer in particular to the Forty Recommendations and the Eight Special Recommendations of the Financial Action Task Force on Money Laundering, as revised in 2003 and 2001, respectively, and, in addition, to other existing initiatives of regional, interregional and multilateral organizations against money-laundering, such as the Caribbean Financial Action Task Force, the Commonwealth, the Council of Europe, the Eastern and Southern African Anti-Money-Laundering Group, the European Union, the Financial Action Task Force of South America against Money Laundering and the Organization of American States.

Chapter III

22. The *travaux préparatoires* will indicate that it is recognized that States may criminalize or have already criminalized conduct other than the offences listed in this chapter as corrupt conduct.

Article 16

23. The *travaux préparatoires* will indicate that this article is not intended to affect any immunities that foreign public officials or officials of public international organizations may enjoy in accordance with international law. The States Parties noted the relevance of immunities in this context and encourage public international organizations to waive such immunities in appropriate cases.

Paragraph 1

24. The *travaux préparatoires* will indicate that a statute that defined the offence in terms of payments "to induce a breach of the official's duty" could meet the standard set forth in each of these paragraphs, provided that it was understood that every public official had a duty to exercise judgement or discretion impartially and that this was an "autonomous" definition not requiring proof of the law or regulations of the particular official's country or international organization.

25. The *travaux préparatoires* will indicate that the phrase "the conduct of international business" is intended to include the provision of international aid.

Paragraph 2

26. The *travaux préparatoires* will indicate that negotiating delegations considered it quite important that any State Party that had not established this offence should, insofar as its laws permitted, provide assistance and cooperation with respect to the investigation and prosecution of this offence by a State Party that had established it in accordance with the Convention and avoid, if at all possible, allowing technical obstacles such as lack of dual criminality to prevent the exchange of information needed to bring corrupt officials to justice.

27. The *travaux préparatoires* will indicate that the word "intentionally" was included in this paragraph primarily for consistency with paragraph 1 and other provisions of the Convention and is not intended to imply any weakening of the commitment contained in paragraph 2, as it is recognized that a foreign public official cannot "unintentionally" solicit or accept a bribe.

28. The *travaux préparatoires* will indicate that paragraph 1 requires that States Parties criminalize active bribery of foreign public officials and paragraph 2 requires only that States Parties "consider" criminalizing solicitation or acceptance of bribes by foreign officials in such circumstances. This is not because any delegation condoned or was prepared to tolerate the solicitation or acceptance of such bribes. Rather, the difference in degree of obligation between the two paragraphs is due to the fact that the core conduct addressed by paragraph 2 is already covered by article 15, which requires that States Parties criminalize the solicitation and acceptance of bribes by their own officials.

Article 17

29. The *travaux préparatoires* will indicate that this article is not intended to require the prosecution of *de minimis* offences.

30. The *travaux préparatoires* will indicate that the term "diversion" is understood in some countries as separate from "embezzlement" and "misappropriation", while in others "diversion" is intended to be covered by or is synonymous with those terms.

Article 19

31. The *travaux préparatoires* will indicate that this article may encompass various types of conduct such as improper disclosure by a public official of classified or privileged information.

Article 23

32. The *travaux préparatoires* will indicate that money-laundering offences established in accordance with this article are understood to be independent and autonomous offences and that a prior conviction for the predicate offence is not necessary to establish the illicit nature or origin of the assets laundered. The illicit nature or origin of the assets and, in accordance with article 28, any knowledge, intent or purpose may be established during the course of the money-laundering prosecution and may be inferred from objective factual circumstances.

Article 27

Paragraph 1

33. The *travaux préparatoires* will indicate that the formulation of paragraph 1 was intended to capture different degrees of participation, but was not intended to create an obligation for States Parties to include all of those degrees in their domestic legislation.

Article 30

Paragraph 2

34. The *travaux préparatoires* will indicate the understanding that the appropriate balance referred to in this paragraph would be established or maintained in law and in practice.

Paragraph 4

35. The *travaux préparatoires* will indicate the understanding that the expression "pending trial" is considered to include the investigation phase.

Article 31

Paragraph 5

36. The *travaux préparatoires* will indicate that this provision is intended as a minimum threshold and that States Parties would be free to go beyond it in their domestic legislation.

Article 35

37. The *travaux préparatoires* will indicate that the expression "entities or persons" is deemed to include States, as well as legal and natural persons.

38. The *travaux préparatoires* will indicate that this article is intended to establish the principle that States Parties should ensure that they have mechanisms permitting persons or entities suffering damage to initiate legal proceedings, in appropriate circumstances, against those who commit acts of corruption (for example, where the acts have a legitimate relationship to the State Party where the proceedings are to be brought). While article 35 does not restrict the right of each State Party to determine the circumstances under which it will make its courts available in such cases, it is also not intended to require or endorse the particular choice made by a State Party in doing so.

Article 36

39. The *travaux préparatoires* will indicate that the body or bodies referred to in this article may be the same as those referred to in article 6.

Article 41

40. The *travaux préparatoires* will indicate that the term "conviction" should be understood to refer to a conviction no longer subject to appeal.

Article 42

Paragraph 1

Subparagraph (a)

41. The *travaux préparatoires* will reflect the understanding that the offence might be committed in whole or in part in the territory of the State Party.

Chapter IV

Article 46

Paragraph 9

Subparagraph (b)

42. The *travaux préparatoires* will indicate that the requested State Party would define "coercive action", taking into account the purposes of the Convention.

Paragraph 19

43. The *travaux préparatoires* will reflect the understanding that the requesting State Party would be under an obligation not to use any information received that was protected by bank secrecy for any purpose other than the proceedings for which that information was requested, unless authorized to do so by the requested State Party.

Paragraph 28

44. The *travaux préparatoires* will indicate that many of the costs arising in connection with compliance with requests made pursuant to article 46, paragraphs 10, 11 and 18, would generally be considered extraordinary in nature. Further, the *travaux préparatoires* will also indicate the understanding that developing countries might encounter difficulties in meeting even some ordinary costs and should be provided with appropriate assistance to enable them to meet the requirements of this article.

Article 48

Paragraph 1

Subparagraph (b) (i)

45. The *travaux préparatoires* will indicate that the term "identity" should be understood to include such features or other pertinent information as might be necessary to establish a person's identity.

Subparagraph (d)

46. The *travaux préparatoires* will indicate that this subparagraph does not imply that the type of cooperation described therein would not be available under the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I).

Paragraph 3

47. The *travaux préparatoires* will indicate that, in considering a proposal made by Chile for a provision on jurisdiction and cooperation with regard to offences committed through the use of computer technology (A/AC.261/L.157 and Corr.1), there was general understanding that article 42, paragraph 1 (a), already covered the exercise of jurisdiction over offences established in accordance with the Convention that were committed using computers if all other elements of the offence were met, even if the effects of the offence occurred outside the territory of a State Party. In that regard, States Parties should also keep in mind the provisions of article 4 of the Convention. The second part of the proposal of Chile suggested that States Parties should note the possible advantage of using electronic communications in exchanges arising under article 46. That proposal noted that States Parties might wish to consider the use of electronic communications, when feasible, to expedite mutual legal assistance. However, the proposal also noted that such use might raise certain risks regarding interception by third parties, which should be avoided.

Chapter V

Article 51

48. The *travaux préparatoires* will indicate that the expression "fundamental principle" would not have legal consequences on the other provisions of this chapter.

Article 52

Paragraph 1

49. The *travaux préparatoires* will indicate that paragraphs 1 and 2 should be read together and that the obligations imposed on financial institutions may be applied and implemented with due regard to particular risks of money-laundering. In that regard, States Parties may guide financial institutions on appropriate procedures to apply and whether relevant risks require application and implementation of these provisions to accounts of a particular value or nature, to its own citizens as well as to citizens of other States and to officials with a particular function or seniority. The relevant initiatives of regional, interregional and multilateral organizations against

money-laundering shall be those referred to in the note to article 14 in the *travaux préparatoires*.

50. The *travaux préparatoires* will indicate that the term "close associates" is deemed to encompass persons or companies clearly related to individuals entrusted with prominent public functions.

51. The *travaux préparatoires* will indicate that the words "discourage or prohibit financial institutions from doing business with any legitimate customer" are understood to include the notion of not endangering the ability of financial institutions to do business with legitimate customers.

Paragraph 2

Subparagraph (a)

52. The *travaux préparatoires* will indicate that the obligation to issue advisories may be fulfilled by the State Party or by its financial oversight bodies.

Paragraph 3

53. The *travaux préparatoires* will indicate that this paragraph is not intended to expand the scope of paragraphs 1 and 2 of this article.

Paragraph 4

54. The *travaux préparatoires* will indicate that the term "physical presence" is understood to mean "meaningful mind and management" located within the jurisdiction. The simple existence of a local agent or low-level staff would not constitute physical presence. Management is understood to include administration, that is, books and records.

55. The *travaux préparatoires* will indicate that banks that have no physical presence and are not affiliated with a regulated financial group are generally known as "shell banks".

Article 53

Subparagraph (c)

56. The *travaux préparatoires* will indicate that, during the consideration of this paragraph, the representative of the Office of Legal Affairs of the Secretariat drew the attention of the Ad Hoc Committee to the proposal submitted by his Office, together with the Office of Internal Oversight Services and the United Nations Office on Drugs and Crime (see A/AC.261/L.212) to include in this paragraph a reference to the recognition of the claim of a public international organization in addition to the recognition of the claim of another State Party. Following discussion of the proposal, the Ad Hoc Committee decided not to include such a reference, based upon the understanding that States Parties could, in practice, recognize the claim of a public international organization of which they were members as the legitimate owner of property acquired through conduct established as an offence in accordance with the Convention.

Article 54

Paragraph 1

Subparagraph (a)

57. The *travaux préparatoires* will indicate that the reference to an order of confiscation in paragraph 1 (a) of this article may be interpreted broadly, as including monetary confiscation judgements, but should not be read as requiring enforcement of an order issued by a court that does not have criminal jurisdiction.

Subparagraph (b)

58. The *travaux préparatoires* will indicate that paragraph 1 (b) of this article shall be interpreted as meaning that the obligation contained in this provision would be fulfilled by a criminal proceeding that could lead to confiscation orders.

Subparagraph (c)

59. The *travaux préparatoires* will indicate that, in the context of paragraph 1 (c) of this article, the term "offender" might in appropriate cases be understood to include persons who may be title holders for the purpose of concealing the identity of the true owners of the property in question.

Paragraph 2

Subparagraph (a)

60. The *travaux préparatoires* will indicate that the term "sufficient grounds" used in paragraph 2 (a) of this article should be construed as a reference to a prima facie case in countries whose legal systems employ this term.

61. The *travaux préparatoires* will indicate in relation to paragraph 2 (a) of this article that a State Party may choose to establish procedures either for recognizing and enforcing a foreign freezing or seizure order or for using a foreign freezing or seizure order as the basis for seeking the issuance of its own freezing or seizure order. Reference to a freezing or seizure order in paragraph 2 (a) of this article should not be construed as requiring enforcement or recognition of a freezing or seizure order issued by an authority that does not have criminal jurisdiction.

Article 55

62. The *travaux préparatoires* will indicate that references in this article to article 31, paragraph 1, should be understood to include reference to article 31, paragraphs 5-7.

Paragraph 1

63. The *travaux préparatoires* will indicate that the term "instrumentalities" should not be interpreted in an overly broad manner.

Paragraph 3

Subparagraph (a)

64. The *travaux préparatoires* will indicate that the statement of facts may include a description of the illicit activity and its relationship to the assets to be confiscated.

Paragraph 7

65. The *travaux préparatoires* will reflect the understanding that the requested State Party will consult with the requesting State Party on whether the property is of *de minimis* value or on ways and means of respecting any deadline for the provision of additional evidence.

Article 57

Paragraph 1

66. The *travaux préparatoires* will indicate that prior legitimate ownership will mean ownership at the time of the offence.

Paragraph 2

67. The *travaux préparatoires* will indicate that return of confiscated property may in some cases mean return of title or value.

68. The *travaux préparatoires* will indicate that the domestic law referred to in paragraph 1 and the legislative and other measures referred to in paragraph 2 would mean the national legislation or regulations that enable the implementation of this article by States Parties.

Paragraph 3

Subparagraphs (a) and (b)

69. The *travaux préparatoires* will indicate that subparagraphs (a) and (b) of paragraph 3 of this article apply only to the procedures for the return of assets and not to the procedures for confiscation, which are covered in other articles of the Convention. The requested State Party should consider the waiver of the requirement for final judgement in cases where final judgement cannot be obtained because the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

Paragraph 4

70. The *travaux préparatoires* will indicate that "reasonable expenses" are to be interpreted as costs and expenses incurred and not as finders' fees or other unspecified charges. Requested and requesting States Parties are encouraged to consult on likely expenses.

Article 58

71. The *travaux préparatoires* will indicate that each State Party may consider creating a new financial intelligence unit, establishing a specialized branch of an existing financial intelligence unit or simply using its existing financial intelligence

unit. Further, the *travaux préparatoires* will indicate that this article should be interpreted in a manner consistent with paragraph 1 (b) of article 14 of the Convention.

Chapter VI

Article 62

Paragraph 2

Subparagraph (c)

72. The *travaux préparatoires* will indicate that this subparagraph is not intended to prejudice the application of article 57.

Chapter VII

Article 63

Paragraph 3

73. The *travaux préparatoires* will indicate that financing should not be linked to the recovery of assets.

Paragraph 7

74. The *travaux préparatoires* will indicate that nothing in this paragraph is intended to limit the discretion of the Conference of the States Parties as the only forum competent to consider whether the mechanism or body to assist in the effective implementation of the Convention is necessary.

Chapter VIII

Article 67

Paragraph 2

75. The *travaux préparatoires* will indicate that "regional economic integration organization" shall mean an organization constituted by sovereign States of a given region, to which its member States have transferred competence in respect of matters governed by the Convention and which has been duly authorized, in accordance with its internal procedures, to sign, ratify, accept, approve or accede to it; references to "States Parties" under the Convention shall apply to such organizations within the limits of their competence.